IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 33208

THE WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,
THE STAFF COUNCIL OF WEST VIRGINIA UNIVERSITY,
TERRY NEBEL, and CHARLES L. MILLER, JR.,

Petitioners,

V.

THE WEST VIRGINIA HIGHER EDUCATION POLICY COMMISSION,

Respondent.

APPELLANTS' BRIEF

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KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Petitioners filed this action in Kanawha County Circuit Court seeking a declaratory judgment to determine whether the West Virginia Higher Education Policy Commission ("the Commission") can require the West Virginia University ("WVU") Board of Governors to alter its salary policy for classified staff employees at WVU's main and regional campuses. The parties entered into a set of stipulations, submitted additional affidavits and documents, and filed cross-motions for summary judgment. Following a hearing, Circuit Judge Charles King ruled in an Order[1] dated April 7, 2006, that the Commission can override the Board of Governors' salary policy that it had set for implementing raises of classified staff employees and to require the Board to pay all such personnel hired after July 1, 2005, at or above the zero step levels in the salary schedule in West Virginia Code § 18B-9-3. Petitioners challenge that ruling as clear error.

ASSIGNMENTS OF ERROR

(1) The circuit court erred in deciding that the Higher Education Policy Commission can force the WVU Board of Governors to alter its salary policy for classified staff at the University.

(2) The circuit court erred in its *sub silentio* ruling that West Virginia Code § 18B-9-4(b)'s requirement that salary increases for classified employees "shall be in accordance with . . . a uniform and equitable salary policy adopted by [the] board of governors" does not confer on the Board of Governors the authority to control classified staff salaries.

(3) The circuit court erred in ruling *sub silentio* that the Higher Education Policy Commission rule on entry level salaries for classified staff is valid, even thought the Commission did not comply

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[1]The Court's Order, which was attached to appellants' Docketing Statement and included in the record on appeal, was captioned, "Defendant's Proposed Final Order Granting Defendant's Motion for Summary Judgment."

with the Higher Education Rule Making Act

STANDARD OF REVIEW

The matters to be determined on this appeal turn entirely on questions of law. The Court therefore considers the issues *de novo*. *E.g.*, *Board of Trustees v. Davis*, 215 W.Va. 539, 543, 600 S.E.2d 251, 255 (2004); *Chrystal R.M. v. Charlie A.L.*, Syl. Pt. 1, 194 W.Va. 138, 459 S.E.2d 415 (1995).

STATEMENT OF THE FACTS[2]

In 2000, the West Virginia Legislature restructured higher education governance in the State. *See* West Virginia Code §§ 18B-1-3, 18B-1B-1 & -4. It eliminated the pre-existing State College System Board of Directors and University System Board of Trustees as of July 1, 2000, when their powers, duties, and property were transferred for one year to an Interim Governing Board. The old Boards had exercised the authority both to set policy and assert broad statewide powers and to establish rules and governance at the institutional level. The new statute divided those roles and provided that, as of July 1, 2001, the policy and oversight duties would be assumed by the newly created Higher Education Policy Commission while the responsibility for policy implementation and institutional governance would be taken over by boards of governors to be established at each of the State's colleges and universities.[3] The 2000 Act further provided that (with exceptions not relevant here) previously enacted legislative rules of the old Boards would no longer be considered legislative

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[2]Unless otherwise noted, the statement of facts is drawn from the stipulations agreed to by the parties and allegations in the complaint admitted to by the defendant.

[3]W. Va. Code § 18B-1-3(i) gave the Commission the authority to transfer to the institutions rules (other than legislative rules) and policies that it deemed to be more appropriately executed or administered at the institutional level.

rules.[4] Policies and rules in effect on July 1, 2001, however, were to be transferred to the Commission and "continue in effect until rescinded, revised, altered, amended or transferred to the governing boards[.]" W. Va. Code § 18B-1-3(h).

Both before passage of the 2000 statute and continuing to the present, Article 9 of Chapter 18B of the West Virginia Code has governed salaries and job classification systems for classified staff at the State's universities. Its § 3 has included a salary schedule that establishes "minimum annual salar[ies]" for staff and that provides for salary increases for each additional year of service, up to fifteen years, and for each advance through twenty-five different pay grades. Subsection (a) states, however, that "payment of the minimum salary shall be subject to the availability of funds, and nothing in this article shall be construed to guarantee payment to any classified employee of the salary indicated on the schedule at the actual years of experience absent specific legislative appropriation therefor."

In 2001, the Legislature rewrote Article 9. An amended § 1 reassigned the responsibility for establishing and maintaining a personnel classification system from the governing boards to the Commission. The salary schedule in § 3 was revised upwards, but it retained both the seniority basis and the language that nothing in the article should be construed to guarantee payment to any classified employee absent specific legislative appropriation providing for such payment. The Legislature also added at that time the following new language[5] to § 18B-9-4(b):

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[4]W. Va. Code § 18B-1-6(d) (2004 Replacement Volume). The Legislature rewrote that section in 2005, but the rewrite does not affect any issue in this case.

[5]*See* Plaintiffs' Exhibits 1 & 2, which provide the engrossed and enrolled versions of S.B. 703 (2001), which contained the revisions to § 18B-9-4. The engrossed version indicates the proposed changes from the pre-existing law, and the enrolled bill sets forth the bill that was passed.

> Any classified salary increases distributed within a state institution of higher education after the first day of July, two thousand one shall be in accordance with the uniform classification system and a uniform and equitable salary policy adopted by each individual board of governors.

Pursuant to that Act, the newly formed WVU Board of Governors adopted on September 7 and October 5, 2001, a "Salary Improvement Plan" to raise salaries, effective October 1, 2001, and a "Salary Plan for West Virginia University." (Plaintiffs' Exhibits 3 & 4.[6]) The latter plan is that which WVU seeks to validate in this litigation; it called for a gradual implementation of the salary schedule in § 18B-9-3 beginning in fiscal year 2003 and continuing over the ensuing five year period, contingent upon adequate appropriations. Since adoption of that plan, the Legislature has not made specific appropriations for funding classified staff salaries at the levels set forth in § 18B-9-3, although a 2005 special legislative session did commit, for the first time since the 2001 Act, funds earmarked for faculty and staff pay increases. (*See* Affidavit of Patricia Hunt at ¶ 5.)

Prior to the 2000 Act, the University System Board of Trustees had promulgated a legislative rule,[7] which was designated Series 62 and codified at W.V.C.S.R. §§ 128-62-1, *et seq.* (*See* Attachment C to the Defendant's Answer.) Section 12 of Series 62 required that entry rates for classified staff must be set at or above minima set forth in the rule, which corresponded to the entry or zero step of the salary schedule in § 18B-9-3. WVU had met § 12's requirement and, moreover, had fully funded all of the old statutory salary schedule. Pursuant to the 2000 Act, Series 62 lost its

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[6]The parties below submitted documents in support of their positions. The documents were variously labeled as an "attachment," "exhibit," or simply "affidavit," depending upon when they were submitted and by whom. All of the supporting documents are included in the record that was filed with this Court.

[7]Rules promulgated by the University System Board of Trustees applied to West Virginia University and its satellite campuses, Marshall University, the West Virginia School of Osteopathic Medicine, and the College of Graduate Studies.

status as a legislative rule. *See* note 4, *supra*. After the Commission came into existence, it issued what it called a "procedural rule," effective November 22, 2001, known as Series 8, which was placed in Title 133 of the Code of State Regulations. (*See* Attachment A to the Answer.) The rule essentially attempted to succeed Series 62 and included a revised § 12:

> The entry rate for any classified employee appointed after the effective date of this rule shall not be below the established minimum set out below for the pay grade assigned. The entry rate for any classified employee appointed on or after July 1, 2005 shall not be below the entry (zero) step set out in W. Va. Code § 18B-9-3 for the pay grade assigned.

W.V.C.S.R. § 133-8-12.1.

WVU determined over time that compliance with Series 8, § 12 would create inequities in the University's salary system by compressing salaries at the lower levels and skewing the seniority basis of § 18B-9-3 and the Board's Salary Plan. *See* Attachment R to the Plaintiffs' Stipulations; Part III, *infra*. The University also concluded that the Commission did not have the statutory authority to impose Series 8 on the Board. Upon being informed of those positions, the Commission adopted the following resolution at its June 10, 2005, meeting, :

> RESOLVED, That in light of the legal issues raised as to whether Series 8, *Personnel Administration*, is in conflict with legislative code, the Higher Education Policy Commission expresses its understanding if an institutional Board of Governors elects to delay implementation of the "zero" step guidelines pending legal resolution of this issue.
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> FURTHER RESOLVED, That the Higher Education Policy Commission requests that if an institution elects to delay implementation, it move expeditiously to seek legal resolution and implement the guidelines if there is not a conflict.

Pursuant to that resolution, the Board of Governors on July 1, 2005, directed the University administration to delay implementation of § 12 and to seek a judicial resolution of that section's legality. The Staff Council at WVU unanimously endorsed that decision. This litigation ensued.

POINTS AND AUTHORITIES

I. WEST VIRGINIA CODE § 18B-9-4(b) ASSIGNS TO THE WVU BOARD OF GOVERNORS THE AUTHORITY TO SET SALARIES FOR THE CLASSIFIED STAFF AT THE INSTITUTIONS UNDER ITS CONTROL.

West Virginia Code §§ 18B-1B-1, *et seq.*, 18B-2A-1, *et seq.*, 18B-9-1, *et seq.*

II. CANONS OF STATUTORY INTERPRETATION REENFORCE THE PLAIN LANGUAGE GIVING THE BOARD OF GOVERNORS THE AUTHORITY TO SET STAFF SALARIES.

West Virginia Code § 18B-9-4.

Taylor-Hurley v. Mingo County Board of Education, Syl. Pt. 3, 209 W. Va. 780, 551 S.E.2d 702 (2001).

Carvey v. West Virginia State Board of Education, 206 W. Va. 720, 731, 527 S.E.2d 831, 842 (1999).

UMWA by Trumka, 174 W.Va. 330, 332, 325 S.E.2d 120, 122 (1984).

Stanley v. Department of Tax and Revenue, 217 W.Va. 65, 614 S.E.2d 712 (2005).

III. THE WVU BOARD OF GOVERNORS HAS ESTABLISHED AND MAINTAINS AN EQUITABLE SALARY SYSTEM FOR CLASSIFIED STAFF THAT WOULD BE COMPROMISED BY COMPLIANCE WITH SERIES 8, § 12.

West Virginia Code § 18B-9-3 & -4.

IV. THE LEGISLATURE'S BESTOWAL OF POWER ON THE COMMISSION TO ESTABLISH A UNIFORM SYSTEM OF CLASSIFICATION FOR EMPLOYEES DID NOT CONFER ON THE COMMISSION THE POWER TO SET SALARIES.

West Virginia Code §§ 18B-9-1, *et seq.*

V. SERIES 8, § 12 WAS NOT ISSUED IN COMPLIANCE WITH THE HIGHER EDUCATION RULE MAKING ACT AND IS THEREFORE UNENFORCEABLE.

West Virginia Code §§ 18B-1-3, 18B-1-6, 18B-1B-4, 18B-2A-4, 29A-1-2, & 29A-3A-1, *et seq.*

Chico Dairy Co. v. Human Rights Commission, 181 W.Va. 238, 382 S.E.2d 75 (1989).

ARGUMENT

I. WEST VIRGINIA CODE § 18B-9-4(b) ASSIGNS TO THE WVU BOARD OF GOVERNORS THE AUTHORITY TO SET SALARIES FOR THE CLASSIFIED STAFF AT THE INSTITUTIONS UNDER ITS CONTROL.

Resolution of the issue in this case turns on a straightforward reading of the applicable code provisions[8] allocating responsibilities between the Commission and the Board of Governors.

Article 1B of Chapter 18B creates the Commission[9] and sets forth its mission and the means for accomplishing it. Section 1 expresses the Legislature's intent that the Commission shall "be responsible to develop, gain consensus around and oversee the public policy agenda for higher education and other statewide issues pursuant to [§ 18B-1-1a]." Subsection (c) of that section provides that "[a]ll matters of governance not specifically assigned to the Commission or Council [for Community and Technical College Education] by law are the duty and responsibility of the

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[8]The relevant sections are collected in the Statutory Appendix that accompanies this brief.

[9]At appellants' oral presentation of the petition for appeal, the Court raised a question whether the Commission is an appropriate party-defendant. Clearly it is. As explained in the Statement of Facts, *supra*, the governing bodies of West Virginia higher education were until July, 2000, the University of West Virginia Board of Trustees and the Board of Directors of the State College System. Those boards could, among other things, "sue and be sued." W. Va. Code § 18B-1-1. On July 1, 2000, the boards' powers and responsibilities were transferred to the interim governing board and were, in turn, transferred to and split between the Commisssion and the institutional boards on July 1, 2001. Presumably, the powers to sue and be sued were included in the transfers. That inference is expressly stated in West Virginia Code § 18B-1B-4(a)(13), which authorizes the Commission to "[a]cquire legal services as are considered necessary, including representation of the Commission, its institutions, employees and officers before any court or administrative body[.]" Section 18B-1B-4(c) also confers on the Commission "such other powers and duties as may be necessary or expedient to accomplish the purposes of this article." The Commission exercised such authority when it requested on June 10, 2005, that any institutional board that disagreed with Series 8 to "move expeditiously to seek legal resolution of this issue." This case followed to obtain a declaratory judgment to resolve a dispute between two state agencies about the laws governing their operations. Appellants know of no barriers to such an action.

governing boards."

Section 4(a) of the Article lists the Commission's powers and duties. Repeating the legislative intent stated in § 18B-1B-1, § 4 states that the Commission's "primary responsibility" is "to develop, establish and implement policy that will achieve the goals and objectives found in [§ 18B-1-1a]." The remainder of the section lists more specific objectives and provides a variety of means for executing the Legislature's design. Generally speaking those provisions address cross-institutional concerns and policy-making. None specifically addresses compensation of institutional employees. Section 18B-1B-4(33) authorizes the Commission to promulgate legislative rules to standardize "the administration of personnel matters among the institutions of higher education." The Commission has not to this date issued any such rule that is relevant to this appeal or any rule concerning compensation that is enforceable under the terms of West Virginia Code §§ 18B-1-6 and §§ 29A-3A-1, *et seq.* (The Higher Education Rule Making Act). *See* Part V, *infra.*

Article 2A of Chapter 18B creates the boards of governors for the State's colleges and universities. Section 4 of the Article sets forth a board's powers and duties. Subsection (a) describes them generally: a board shall "[d]etermine, control, supervise, and manage the financial, business and education policies and affairs of the state institution[] under its jurisdiction." Among the express grants, West Virginia Code § 18B-2A-4(j) confers on the boards of governors the power to "administer a system for the management of personnel matters, including, but not limited to, personnel classification, *compensation* and discipline for employees." (Emphasis added.) The section makes that authority subject to rules adopted by the Commission, but, as just noted, there is no such rule in existence at this time. *See* Part V, *infra.* Section 4(j) also says that the boards' authority is subject to the provisions of §§ 18B-9-1, *et seq.*, the article on classification and

compensation of classified staff employees.

Section 1 of Article 9 assigns to the Commission the responsibility for establishing and managing a uniform system of classification for nonfaculty employees in higher education. Section 18B-9-3 then provides the aspirational (and unenforceable) salary schedule for classified employees based on the twin axes of years of seniority and pay grade. Of greatest significance to this case, § 18B-9-4(b) provides:

> Any classified salary increases distributed within a state institution of higher education after the first day of July, two thousand one shall be in accordance with the uniform classification system and *a uniform and equitable salary policy adopted by each individual board of governors*.

(Emphasis added.) It is difficult to imagine how the Legislature could have made it any clearer: the boards of governors set salaries. That language was new with the 2001 Act (*see* Plaintiffs' Exhibit 1 at 7) and manifested the Legislature's desire that, after the new governance structure became effective on July 1, 2001, salary matters should be moved from the statewide policy-making board (now the Commission) to the boards for the individual institutions.[10]

The circuit court's response to the plain language of § 18B-9-4(b) was conveniently simple: the court ignored it. Not once do the "Discussion" or the "Conclusions of Law" sections of the circuit court's opinion even refer to § 4(b), let alone make some effort to explain it away.[11] Instead,

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[10]That conclusion is reenforced by the fact that the Legislature suspended the legislative rule status of those rules of the former Boards of Trustees that it believed to be better handled at the institutional level while retaining legislative rule status for those rules that had a broader, statewide impact. *See* n. 3, *supra*. As previously noted, Series 62 was not retained as a legislative rule.

[11]Paragraph 15 of the Findings of Facts, which were prepared by the parties and adopted verbatim by the court, does quote § 4(b), but the court never returns to it.

The Commission also ignored § 18B-9-4(b), both in its attempt to enforce Series 8 against WVU and in its summary judgment memorandum to the circuit court. When it finally addressed the provision, at page 7 of its Response to the Petition for Appeal, the Commission offered the rather

the lower court rested its decision on generalities and platitudes that fail to overcome the clear statutory language.

II. CANONS OF STATUTORY INTERPRETATION REENFORCE THE PLAIN LANGUAGE GIVING THE BOARD OF GOVERNORS THE AUTHORITY TO SET STAFF SALARIES.

Any common sense reading of the text of the relevant statutory provisions leads to the conclusion that the Legislature in § 18B-9-4(b) has bestowed on the institutional boards of governors the full authority to set classified staff salaries. That common sense judgment is supported by, and no doubt undergirds, two maxims of statutory construction that have been repeatedly followed by this Court.

First, it is a "general rule of statutory construction that a specific statute be given precedence over a general statute relating to the same subject." *E.g.*, *Taylor-Hurley v. Mingo County Board of Education*, Syl. Pt. 3, 209 W. Va. 780, 551 S.E.2d 702 (2001); *Carvey v. West Virginia State Board of Education*, 206 W. Va. 720, 731, 527 S.E.2d 831, 842 (1999); *UMWA by Trumka*, 174 W.Va. 330, 332, 325 S.E.2d 120, 122 (1984). Thus, to the extent that the Commission can cite to some broad oversight authority over its subject institutions, that authority is trumped by the specific legislative grants in §§ 18B-2A-4(j) and 18B-9-4(b). The maxim has reason behind it; the specific statute

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ludicrous distinction that § 18B-9-4(b) does accords institutional boards authority over only salary increases and, because new employees do not receive salary increases, the § 4(b) authority therefore has no application to zero or entry level salaries. Not only does that interpretation flaunt the clear legislative intent expressed in § 4(b), but it is also detached from reason. The Board of Governors does not set individual salaries; rather, it creates "a uniform and equitable salary policy" that provides for compensation based on years of service and pay grade. When the Board increases salaries, it does so on a uniform basis for all levels, *including* the zero or entry level. That is what § 4(b) refers to as "classified salary increases" – increases made on a systemic basis across all pay grades and across all tenure levels. Moreover, there is no disputing that WVU's compliance with Series 8, § 12 would require a "salary increase" for the zero step level.

reflects a legislative determination focused on the precise factual situation, while the broad provision deals only in generalities and does not imply any legislative judgment about a particular circumstance. *See generally* 2A SUTHERLAND, STATUTORY CONSTRUCTION § 51.05.

Second, where doubt exists as to which statute controls, the "general rule of statutory construction" is that "controlling effect must be given to the last enactment of the Legislature." *Taylor-Hurley, supra*, Syl. Pt. 2; *see also, e.g., Carvey, supra*; *State ex rel. Department of Health and Human Resources v. West Virginia Public Employees Retirement System*, Syl. Pt. 2, 183 W.Va. 39, 393 S.E.2d 677 (1990). Again, this makes sense; the Legislature is presumed to know the canvass of laws and regulations in existence when it acts, and it therefore follows that the later enactment was intended to supersede prior laws. In this case, the more recently enacted (2001) provision in § 18B-9-4(b) controls over any general grant conferred on the Commission in the 2000 Act.

Both of the maxims were recently reaffirmed by this Court in *Stanley v. Department of Tax and Revenue*, 217 W.Va. 65, 614 S.E.2d 712 (2005), when it decided that a later enacted provision dealing specifically with remedies for educational employees pursuing a grievance trumped a prior statute concerned more generally with administrative relief for all public employees. *Id.* at 717-19.

The circuit court relied on a different set of maxims of statutory construction, none of which can be questioned as to their validity *per se*. The court's application of them to this case, however, was plainly wrong; indeed, proper application of these rules should have led to the opposite conclusion. As its Order noted (at page 11), a court should strive to give effect to legislative intent and should read relevant provisions in context and as part of the statute as a whole to accomplish the general purpose of the legislation. *E.g., Ewing v. Board of Education of Summers County*, 202

W.Va. 228, 241, 503 S.E.2d 541, 554 (1995); *Smith v. Workers' Compensation Commissioner*, 159 W.Va. 108, 109, 219 S.E.2d 361, 362 (1975). It is also the case that laws that "relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Circuit Court Order at 12, *citing West Virginia Department of Health and Human Resources v. Hess*, 189 W.Va. 357, 358, 432 S.E.2d 27, 28 (1993); *accord, Carvey v. West Virginia Board of Education*, 206 W.Va. 720, 731, 527 S.E.2d 831, 842 (1999). Part I, *supra*, followed those directives: the discussion there identified the general policy and oversight responsibilities of the Commission set forth in §§ 18B-1B-1, *et seq.*; noted that "all matters of governance not specifically assigned to the [Commission] by law are the duty and responsibility of the governing boards," § 18B-1B-1; described the institutional boards' responsibilities for management at the ground level, including for personnel and compensation matters, 18B-2A-1, *et seq.*; and explained the distinct division of labor between the Commission and the boards created by Article 9 of Chapter 18B regarding the creation of a job classification system and the determination of staff salaries. That review inexorably leads to the conclusions that the Board of Governors sets the schedule for staff salaries and the Commission cannot direct otherwise, at least not without adopting a legislative rule.[12] The circuit court, by contrast, failed to read §§ 18B-1B-4, 18B-9-1, and 18B-9-3 in conjunction with 18B-9-4, thereby failing to follow the very principles of statutory interpretation that it cites at pages 11-12 of its opinion.

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[12]The same response can be made to the circuit court's recitation of interpretive guidance on pages 14 - 15 of its order, which quoted Syllabus Point 5 of *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908), and Syllabus Point 1 of *Parkins v. Londeree*, 146 W.Va. 1051, 124 S.E.2d 471 (1962), for the general proposition that statutes should be read in light of the general legislative intent. Petitioners agree and, for the reasons stated in Part I and in the text here, that reading leads to the conclusion that the Board's salary policy controls.

The circuit court also relied on the maxim from *Click v. Click*, Syl. Pt. 2, 98 W.Va. 419, 127 S.E. 194 (1925): "It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity."[13] Circuit Court Order at 15. It is hardly absurd and unjust, however, to hold that the statute accords primacy to the Board of Governor's "uniform and equitable salary policy" adopted pursuant to the requirement in § 18B-9-4(b) over a dictum from the Commission that attempts to force a limited degree of statewide uniformity, particularly when that same Commission dictum creates inequalities within job categories throughout the classification system.[14] While it is fair to say that achieving statewide uniformity in classified staff salaries was a legislative goal in creating the salary schedule in § 18B-9-3, it is just as fair to say that promoting reliance on seniority in setting staff salaries was also a legislative goal behind the schedule. And it is not absurd and unjust for WVU to emphasize equity among its classified employees over a narrow, partial uniformity with other state institutions. As explained in Part III, immediately below, the approach adopted by the Commission in Series 62, § 12 subverts the legislative will by rejecting a seniority-based system.

III. THE WVU BOARD OF GOVERNORS HAS ESTABLISHED AND MAINTAINS AN EQUITABLE SALARY SYSTEM FOR CLASSIFIED STAFF THAT WOULD BE COMPROMISED BY COMPLIANCE WITH SERIES 8, § 12.

The Board of Governor's salary policy and its insistence on adhering to it are, like the

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[13]The court's use of this maxim to escape the "literal sense of the words" in the statute is rather ironic given its failure to acknowledge what are the most relevant words in the statute, those in § 18B-9-4(b). Moreover, invocation of the maxim implicitly concedes that the relevant code provisions, read literally, place control over classified staff salaries on the institutional boards.

[14]As the lower court noted on page 15 of its Order, Series 8, § 12 applies only to hires made after July 1, 2005. Any pre-existing lack of uniformity continues as to all other positions.

Legislature's salary schedule in § 18B-9-3, premised in that most sacred of employee concerns: respect for seniority. Unions and other employee organizations have long insisted on a regard for seniority, and courts and legislatures have been loathe to interfere with the settled expectations that seniority systems create. *E.g., US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (deviating from a seniority system to accommodate a worker with a disability would not be a "reasonable" accommodation in the run of cases); *Transworld Airlines v. Hardison*, 432 U.S. 63, 79-80 (1977) (qualifying co-workers' seniority rights would not be a reasonable accommodation of an employee's religion under Title VII); *Teamsters v. United States*, 431 U.S. 324, 348-56 (1977); *Humphrey v. Moore*, 375 U.S. 335, 346-47 (1964) (seniority rights are of "overriding importance" in the nation's economy); *see also* BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 51 (3d ed. 1996) ("the use of seniority for the allocation of benefits in the workplace is deeply rooted in American industrial relations"). As the Supreme Court recently noted in *Barnett*, "case law has recognized the importance of seniority to employee-management relations. . . . [T]he typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." 451 U.S. at 403-04. Reliance on seniority provides employees with predictability and protection from arbitrary employer actions. Length of service creates for employees a species of property right that is honored by fair employers.[15] Those reasons have spurred labor's insistence on adherence to seniority, supported the Legislature's use of length of service in creating the § 18B-9-3 salary schedule, and prompted the

[15]Not surprisingly, then, laws protecting workers from discrimination routinely provide defenses for bona fide seniority systems. *E.g.*, Equal Pay Act, 29 U.S.C. § 206(d); Age Discrimination in Employment Act, § 4(f), 29 U.S.C. § 623(f); Title VII, Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h).

Staff Council's unanimous endorsement of the University's position, which, in turn, was grounded in respect for employee interests. *See* Attachment R (accompanying Plaintiffs' Stipulations). As explained in Attachment R, the effect of immediate compliance with Series 8 would compromise seniority by creating salary inversion or compression within classifications, *i.e.*, persons with no seniority would receive salaries at or above the amounts paid more senior employees within the same classification.

The circuit court dismissed these concerns, citing two cases that, it says, concluded that ignoring seniority and creating salary inversion or compression are not "inherently wrong or unlawful." Circuit Court Order at 17. Of course, that a practice does not violate some law does not necessarily mean that it is fair or that an employer (or union) would be unwarranted in avoiding it. In any event, the two cases provide no basis for undermining WVU's position.

One of the cases, *Largent v. West Virginia Division of Health*, 192 W.Va. 239, 452 S.E.2d 42 (1994), did indeed hold that a salary inversion within a particular classification did not violate the Equal Pay Act. The Court's conclusion, however, was based on the fact that all of the employees in the relevant work unit were women and on the deduction that, therefore, there could not possibly have been unequal pay "on the basis of sex" in violation of the Act. 29 U.S.C. § 206(d). The case also held that the Division's reliance on factors other than seniority and classification in setting salaries – factors such as market demand, education, skill, etc. – did not violate the rational basis standard under Equal Protection Clause analysis. Obviously, an employer could rationally choose to rely on a range of factors for setting salaries, especially for jobs with a more subjective or specialized content. That does not mean that an employer would be irrational to favor a system that used only objective factors to set minimum salaries and guaranteed its employees that continued

service would provide compensation levels not available to less senior workers doing the same job. Moreover, it is well-known that the rational basis analysis used in *Largent* tolerates many classifications that our society generally finds to be inherently unfair and discriminatory. *E.g., compare Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (state's reliance on age in making employment decision – mandatory retirement of state police at age 50 – had a rational basis) *with* The Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* (prohibiting discrimination on the basis of age in any employment context unless it is within one of a set of very narrow defenses). Thus, the only point to be derived from *Largent* is that a public employer *may* rely on factors other than classification and seniority in setting salaries. That is hardly a surprising,[16] or particularly relevant, conclusion.

The other case cited by the circuit court on this point, *West Virginia University v. Decker*, 191 W.Va. 567, 447 S.E.2d 259 (1994), addressed a claim brought by a senior faculty member at WVU who claimed that the University's practice of hiring new faculty at market demand salary levels, while failing to sustain that competitiveness with longer term faculty, constituted age discrimination prohibited by the Human Rights Act. As a result of the University's practice, "compression and inversion of faculty salaries" resulted. *Id.*, 191 W.Va. at 570, 447 S.E.2d at 262. The lower court maintained that *Decker* ruled that those circumstances "did not constitute discrimination." Circuit Court Order at 16-17. That is not, however, what *Decker* held. In fact, its holdings embraced the conclusion that the University's salary policy *was* discriminatory; it imposed an adverse impact on Decker's class of faculty members over the age of forty. 191 W.Va. at 574,

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[16]In fact, West Virginia Code § 18B-9-5 expressly authorizes merit increases and salary adjustments made in accordance with policies set forth by the institutional board of governors.

447 S.E.2d at 266. Decker lost his claim only because the Court also found that the University had established the business necessity defense, that its policy of paying new faculty at fair market value was essential for it to continue to be competitive in hiring qualified faculty members. Neither *Decker* nor *Largent* can be relied upon to discount WVU's legitimate and overriding concern to protect the integrity of its (and the Legislature's) seniority-based salary schedule.

WVU's Board of Governors, supported by its staff council, has met its obligation under West Virginia Code § 18B-9-4(b) to adopt a "uniform and equitable salary policy." It is uniform in its consistent treatment of employees according to their rank and years of service and it is equitable in its respect for employees' seniority rights. Meanwhile, the University has strived to move all of its employees to levels at or above those set forth in the § 18B-9-3 salary schedule. Immediate compliance with Series 8, § 12 would upset all of those efforts.[17]

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[17]The circuit court flippantly remarked at page 17 of its Order that additional funding to address salary inversion and compression concerns could be found by digging into "the additional $69,544,00 in net revenues generated by WVU over the last five years." The statement reveals a bewildering lack of appreciation for the complexities involved in setting a budget and warrants several responses.

First, whatever amount the University has received in increased revenues, it is irrelevant. The issue in this case is a straightforward question of statutory interpretation that in no way turns on the details of the budget of any of the affected institutions. Second, as noted in the affidavit of Elizabeth Reynolds (at ¶ 3), the $69 million dollar figure that the Commission submitted as WVU's five year increase in revenues cannot be relied upon because there were significant changes made in accounting procedures during that period. Thus, the year to year comparisons are misleading. Third, even if the $69 million number were accurate, standing alone it means nothing. Over a five year period, it reflects an average annual increase of $14 million. In a budget that ranged during that period (according to the Hunt Affidavit submitted by the Commission) between $540 and $602 million, that means there was an average annual increase of between 2.3% and 2.6%. Those percentages approximate or lag behind inflation rates for those years. *See* Table at: http://inflationdata.com/Inflation/Inflation_Rate/CurrentInflation.asp. Fourth, as explained by Elizabeth Reynolds in ¶ 4 of her affidavit, 42% of the increase in revenues since 2000 has come from grants and contracts, funds which are earmarked for specific commitments and are not available for discretionary spending, such as salary enhancement. Fifth, from 2002 to 2005 alone, state support of the University decreased by $30.8 million while unfunded mandates increased by $21.1 million.

IV. THE LEGISLATURE'S BESTOWAL OF POWER ON THE COMMISSION TO ESTABLISH A UNIFORM SYSTEM OF CLASSIFICATION FOR EMPLOYEES DID NOT CONFER ON THE COMMISSION THE POWER TO SET SALARIES.

On several occasions in its Order (*see* pages 10, 13, 18), the circuit court asserted or implied that the authority to establish a job "classification" system necessarily implies the authority to control compensation.[18] While the two issues are related in the sense that an employee's classification will necessarily affect his or her compensation, they are two totally different concepts and involve different decision-making mechanisms. Classification requires a professional judgment about the level of skill, effort, and responsibility needed to complete satisfactorily the duties of a given job. It is concerned solely with the relative content of particular jobs, without regard to the individual occupying the job. Compensation decisions must take into account not just the employees' classification but also assorted equitable factors such as relative years of service, availability of funds, and competing demands for limited resources. In some compensation systems, factors such as individual merit, extra effort, and additional education, among others, may enter into the decision-

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Id. at ¶ 2. Thus, if one assumes the $69 million increase in revenues is accurate, then reduces the figure by the 42% derived from grants and contracts increases, then subtracts the $21 million dollars (for just three of the five years) in unfunded mandates, one finds a remainder of about $8 million increase in funds available for discretionary spending, a sadly inadequate figure for an institution with more than $600 million in annual commitments. Needless to say, that "increase" runs well behind inflation. Sixth, because WVU and WVU Institute of Technology maintain a higher concentration of classified staff than do the other state colleges and universities, *see id.* at Exhibit 8, the Board of Governors faces a more difficult challenge in meeting the zero step while avoiding salary inversion or compression. Finally, the court's statement ignores the fact that the University's budgetary process must contend with multiple demands for whatever unrestricted funds are available.

[18]For example, the Court states at page 13 that § 18B-9-1's grant of authority to maintain the classification system "is unequivocal evidence of legislative intent" for Commission primacy "when it comes to the personnel classification *and compensation* system." (emphasis added) The leap from classification to classification *and compensation* is anything but unequivocal, especially when three sections later the Legislature assigns to each governing board the responsibility for devising "a uniform and equitable salary policy."

making.[19] *See* J.J. MARTOCCHIO, STRATEGIC COMPENSATION: A HUMAN RESOURCE MANAGEMENT APPROACH 231 (describing factors used in compensation decisions) & 239 (describing classification plans) (4th ed. 2006).

In enacting § 18B-9-1, *et seq.*, the Legislature perceived and made the distinction between creating a classification system and setting compensation. Section 1 of that Article expressly put on the Commission the responsibility for establishing and maintaining "a complete, uniform system of personnel classification," W. Va. Code § 18B-9-1, and § 2(g) defines "personnel classification system" as "the process of job categorization adopted by the commission . . . by which job title, job description, pay grade and placement on the salary schedule are determined." W. Va. Code § 18B-9-2(g). "Salary" is separately defined as "the amount of compensation paid throught the sate treasury per annum to a classified employee." *Id.* at (h). Section 18B-9-4(b) then states that salary increases for classified staff after July 1, 2001, "shall be in accordance with *the* uniform classification system [*i.e., the* system developed by the Commission] and *a* uniform and equitable salary policy adopted *by each individual board of governors.*" (Emphases added.) Thus, the Legislature directed that the Commission handles the classification system while the boards take care of compensation policy.

V. SERIES 8, § 12 WAS NOT ISSUED IN COMPLIANCE WITH THE COMMISSION'S ENABLING LEGISLATION OR WITH THE HIGHER EDUCATION RULE MAKING ACT AND IS THEREFORE UNENFORCEABLE.

The circuit court emphasized, at page 12 of its order, the language in § 18B-1B-4(33) authorizing the Commission to "promulgate rules as necessary or expedient to fulfill the purposes

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[19]The salary schedule in § 18B-9-3 does not necessarily preclude an institution from taking into account such additional factors. Indeed, West Virginia Code § 18B-9-5 expressly authorizes "merit increases and salary adjustments in accordance with policies established by the board of governors."

of this chapter" and "for standardizing . . . the administration of personnel matters" among the institutions. *See also* W. Va. Code § 18B-2A-4(j) (institutional boards' personnel authority subject to Commission rules). While the quotes are accurate, the lower court conveniently omitted critical language from the operative provisions. Section 18B-1B-4(33) states, in full, that the Commission shall have the power to:

> *Pursuant to* the provisions of [the Higher Education Rule Making Act, §§ 29A-3A-1, *et seq.*], and [§ 18B-1-6], promulgate rules as necessary or expedient to fulfill the purposes of this chapter. The Commission and the Council shall promulgate a uniform joint *legislative* rule for the purpose of standardizing, as much as possible, the administration of personnel matters among the institutions of higher education[.]

(Emphases added.) If the Commission had validly promulgated a legislative rule requiring the boards to fund salaries at the zero step or higher, then there would be a conflict to be resolved between the Commission's rule-making authority under §§ 18B-1B-4 and 18B-2A-4(j) and the legislative directive in § 18B-9-4(b) assigning staff salary-setting to the institutional boards. That conflict does not exist, however, because the Commission has not promulgated an enforceable rule. As noted earlier in the text, Series 8 is not a legislative rule, and it is not otherwise enforceable under the terms of either §§ 18B-1-1, *et seq.*, or the Higher Education Rule Making Act ("HERMA"), W. Va. Code §§ 29A-3A-1, *et seq.*

The Commission's rule making authority derives from several sources. Relevant to this case is the above-quoted §18B-1B-4(33). In addition, subsection (a) of § 18B-1-6 – which is entitled "Rule making" – empowers the Commission "to promulgate, adopt, amend, or repeal rules, in accordance with the provisions of [HERMA], subject to the provisions of [§ 18B-1-3[20]]." Obviously, HERMA is crucial in determining whether Series 8, § 12 is a valid rule.

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[20]Section 18B-1-3 is discussed below.

Section 29A-3A-2 of that Act requires that "every rule and regulation (including any amendment of or rule to repeal any other rule) shall be promulgated by the board only in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article." Section 1 of the Act defines "board" to mean "the higher education policy commission or the chancellor as defined in [§§ 18B-1-1, *et seq.*] of this code." The applicable definition of "rule" is found in West Virginia Code § 29A-1-2(i) and states:

> "Rule" includes every regulation, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations relating solely to the internal management of the agency, nor regulations of which notice is customarily given to the public by markers or signs, nor mere instructions. Every rule shall be classified as "legislative rule," "interpretive rule" or "procedural rule," all as defined in this section, and shall be effective only as provided in this chapter[.]

As provided in that definition, a rule must be a legislative, an interpretive, or a procedural rule. Subsection (d) of that provision defines a "legislative rule" as including

> every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature.

The Commission does not – and could not – contend that Series 8, § 12 is a valid legislative rule because the Commission's amendment of it was not done pursuant to the elaborate procedures required by West Virginia Code §§ 29A-3A-5 through 14 for creating legislative rules. Instead, the Commission has labeled Series 8 a "procedural rule." But calling it a procedural rule does not make it one, and attaching the label does not make it valid.

A "procedural rule" is defined in § 29A-1-2(g) as a rule "which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency." That does *not* describe Series 8. The Commission has attempted to circumvent the Act's procedures for creating a legislative rule – a rule that has "the force of law or . . . grants or denies a specific benefit" or that "is determinative on any issue affecting private rights, privileges or interests" – by the mere expedience of calling Series 8 "procedural." If § 12 is to have "the force of law" that the Commission argues for, then it has to be a legislative rule, and to be a valid legislative rule, it must have gone through the 29A-3A-5, *et seq.*, procedures. Because it has not, and because § 12 is not a valid procedural rule, the section is a nullity.

This Court dealt with a similar situation in *Chico Dairy Co. v. Human Rights Commission*, 181 W.Va. 238, 382 S.E.2d 75 (1989). In that case, the Commission had attempted to expand by rule the definition of "handicap" under the Human Rights Act, which had a corresponding effect of expanding private rights. The Commission had labeled its rule an "interpretive rule" and had not submitted it to the Legislature for review, as required for a legislative rule. The rule was rejected:

> In the present case the Commission's rule § 77-1-2.7 is a "legislative rule," not an "interpretive rule." It expressly extends the statutory definition of "handicap" so as to form a basis for the imposition of civil sanctions under the Act, as was done in this case; the rule confers a right not provided by law; and the rule affects private rights and purports to regulate private conduct.
>
> This "legislative rule" was not, however, submitted to, reviewed by and approved by the legislative rule-making review committee and the legislature, as required by *W. Va. Code*, 29A-3-9 to -14, as amended. It is, therefore, of no effect under the State Administrative Procedures Act.

Id., 181 W.Va. at 244, 382 S.E.2d at 81; *see also State ex rel. Kincaid v. Parsons*, 191 W.Va. 608, 447 S.El.2d 543 (1994) (regional jail administrator's ban on inmate smoking seriously affected inmates' rights and was therefore not enforceable because it had not been promulgated through the

legislative rule making procedure).

The Commission's response to the foregoing rests on West Virginia Code § 18B-1-3(h)(1), *see* Response to Petition for Appeal at 12-15, which qualifies the application of HERMA to rules adopted prior to July 1, 2001 Enacted as part of the 2000 Act, that section states:

> (h) All orders, resolutions, policies and rules [] (1) Adopted or promulgated by the respective board of trustees, board of directors or interim governing board and in effect immediately prior to the first day of July, two thousand one, are hereby transferred to the commission effective the first day of July, two thousand one, and continue in effect until rescinded, revised, altered, amended or transferred to the governing boards by the commission as provided in this section and in [§ 18B-1-6].

Hence, the Commission argues, the old Series 62 continued in effect as a rule when the Commission assumed power and was merely renumbered as the new Series 8 when the Commission's rules were transferred to Title 133. By that measure, then, Series 8 controls. There are, however, two facts that totally defeat the Commission's reasoning.

First, in the months intervening between the enactment of § 18B-1-3(h) and July 1, 2001, the Legislature amended §§ 18B-9-3 and -4 and specifically reassigned responsibility for the adoption of "a uniform and equitable salary policy [to] each of the individual board of governors." *Id.* at (b). Thus, the subsequently enacted statute clearly nullifies the previously created administrative rule – whatever its label. *See* Part I, *supra.*

Second, the current Series 8 does not qualify for the § 18B-1-3(h) safe haven because that rule perpetuated the old rules only "until rescinded, revised, altered, amended or transferred to the governing boards[.]" When the Commission adopted Series 8, it most assuredly "revised, altered, [or] amended" the old Series 62. Even a cursory glance at § 12.1 in Series 8, Attachment A to Defendant's Answer, compared to § 12.1 in Series 62, Attachment C to Defendant's Answer, reveals

significant changes in the policy toward entry level salaries. As the Commission stated in its response to the petition for appeal:

> In the stipulated facts recited by the circuit court, the Commission was originally inclined to require all employees be immediately moved to the "zero" step as seemed to be required by Series 62. Instead the Commission, at subsequent meetings, considered first *amending* Series 62 to allow a two year transition to the new "zero" step and then to a four year transition. Series 62 was then redesignated as Series 8 of the Commission's rules and *amended* to not require new employees to be paid the "zero" step until July 1, 2005. The Commission also directed that all current employees reach the "zero" step by that time.

Response at 13 (emphases added). By that account, it is obvious that the Commission was engaged in a major policy decision when it considered changing § 12 and that the Commission did, in fact, revise, alter, or amend the old rule. *See also* W.V.C.S.R. § 133-8-1.1 ("This rule establishes *policy* in a number of areas regarding personnel") (emphasis added).[21] Moreover, the new Series 8 did not just alter the old § 12.1; it also completely eliminated §§ 12.1 through 12.5, which provided extensive regulation for exceptions and entry offers above the specified minima, and it deleted both § 20's "miscellaneous" provisions and a table setting forth the entry level minima that were the

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[21]The Commission also cited § 18B-9-4(a) as authority for the validity of Series 8, § 12. Response to Petition for Appeal at 12. That section states, in relevant part:

> The equitable system of job classification and the rules establishing it which were in effect immediately prior to the effective date of this section are hereby transferred to the jurisdiction and authority of the commission and shall remain in effect unless modified or rescinded by the commission.

That provision has no bearing on this case. As explained in Part IV, *supra*, the Legislature has separated the system of "job classification" from "a uniform and equitable salary policy." Those are different concepts. Thus, continuing the rules on "classification" does not continue any rule on setting salaries. Even if § 12 were considered to be part of "job classification," § 18B-9-4(a) would still not sustain the Series 8 version because it sustained the effectiveness of the old rule "*unless modified.*" (Emphasis added.) As explained in the text, Series 8 "modified" § 12 and thus rendered § 18B-9-4(a) inapplicable.

subject of § 12.1.[22] To make those amendments in a valid manner, however, the Commission had to enact a legislative rule using the procedures set forth in the HERMA.[23] It failed to do that.

Series 8, § 12 – or W.V.C.S.R. § 133-8-12 – is a complete nullity.[24]

RELIEF PRAYED FOR

The Court should reverse the decision of the circuit court and declare that West Virginia Code 18B-9-4(b) bestows on the WVU Board of Governors the authority to establish a uniform and equitable salary policy for its classified staff that cannot be overridden by the Commission, at least in the absence of a validly promulgated legislative rule. The Court should further declare that the Board may adhere to its salary policy and need not comply with the Commission's zero step policy set forth in Series 8, § 12.

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[22]Attachments A and C to the Defendant's Answer provide parts of the new Series 8 and the old Series 62, respectively, but they do not include more than the first pages of the rules and the pages including § 12.1. The entireties of both the old and new rules are available on-line, however. Series 62 can be found at http://hepc.wvnet.edu/UnivSys/TITLE128/T128S62.HTM. The new rule is available through the Secretary of State's website at http://www.wv.gov/Offsite.aspx?u=http://www.wvsos.com.

[23]The fact – pointed out by the Commission at pages 14-15 of its Response to the Petition for Appeal – that the Legislature did not specifically state in the 2001 Act that the joint Commission/Council rule on a uniform personnel policy must be a legislative rule is completely irrelevant. From the beginning, the Legislature has required that *any* Commission rule making must be pursuant to HERMA. When the Commission amended § 12 of Series 8, the Commission was clearly engaged in rule making, and that particular rule making was just as certainly legislative and not procedural. Therefore, the rule can only be valid if the Commission adhered to the HERMA procedures for legislative rule making, and the Commission did not do that.

[24]The appellants do not – as suggested by the Commission on page 15 of its Response – claim that the remainder of Series 8 dealing with the classification system is void. Whether the amendment to § 12 of the rule affects other provisions of Series 8 is not before the Court, and the appellants take no position on that question.

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CERTIFICATE OF SERVICE

I have on this the 12th day of January, 2007, mailed a copy of the foregoing Brief to defendant's counsel, Bruce Ray Walker, West Virginia Higher Education Policy Commission, 1018 Kanawha Blvd., East, Suite 700, Charleston, W. Va. 25301.